SNACK FOOD
ASSOCIATION
An International Trade Association

December 11, 2003

Country of Origin Labeling Program
Room 2092-S
Agricultural Marketing Service
United States Department of Agriculture
Stop 0249
1400 Independence Avenue, SW
Washington, D.C. 20250-0249

Re: Docket # LS-03-04, Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts; Proposed Rule

The Snack Food Association (SFA) and the Peanut & Tree Nut Processors Association (PTNPA) welcome this opportunity to comment on the implementation of a mandatory country of origin labeling program. In response to the Agricultural Marketing Service (AMS) interim guidance announced in the October 11, 2002 *Federal Register*, we filed comments in April with the hope that the proposed rule would reflect the consideration given to these comments. We recognize the difficulty in drafting such a proposal; however, we were disappointed to find the proposal in the October 30th *Federal Register* to be unresponsive and, in fact, to perpetuate our concerns.

Of greatest concern is the statement: "All peanuts, whether raw, roasted, in-shell, shelled, salted, seasoned, or canned are subject to these regulations unless they are an ingredient in a processed food item." We continue to believe that this statement reflects the unjustified inconsistent treatment of processed peanuts, as opposed to the treatment of other processed covered commodities. As stated in the enclosed comments, peanuts that have undergone shelling, peeling, cooking, curing, seasoning, flavoring, and packaging historically have been considered "processed." Accordingly, this inconsistent treatment is a departure from precedent, and moreover, no legislative pronouncement authorizes such a departure.

Because SFA and PTNPA continue to have great concern regarding the proposed implementation of country of origin labeling requirements with regard to peanuts, we resubmit our comments. We believe these comments are still valid and trust that AMS will take them into consideration at this time. We look forward to working with the agency on this issue, and thank you for your consideration.

Sincerely,

James A. McCarthy
President & CEO
Snack Food Association

Russell E. Barker
President and CEO
Peanut & Tree Nut Processors Association

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Country of Origin Labeling Program
Agricultural Marketing Service
United States Department of Agriculture
Stop 0249, Room 2092-S
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Re: Docket # LS-02-13, Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts Under the Authority of the Agricultural Marketing Act of 1946

The Snack Food Association (SFA) and the Peanut & Tree Nut Processors Association (PTNPA) welcomes this opportunity to provide comments regarding the Agricultural Marketing Service (AMS) guidelines for country of origin labeling published in the *Federal Register* of October 11, 2002. While SFA and PTNPA appreciates the difficulty in drafting such guidelines, SFA and PTNPA objects to the guidance as it applies to peanuts and peanut products. Accordingly, these initial comments address only that portion of the guidelines pertaining to peanuts and the processed food item exemption.

The Snack Food Association is an international trade association representing snack food manufacturers and suppliers. SFA business membership includes, but is not limited to, manufacturers of potato chips, tortilla chips, crackers, corn chips, pretzels, popcorn, extruded snacks, meat snacks, pork rinds, snack nuts, party mix, fruit snacks, cereal snacks, snack bars, and various other snacks. Retail sales of snack foods in the U.S. total more than $30 billion annually.

The Peanut & Tree Nut Processors Association provides a common forum for the processors and manufacturers of peanuts, tree nuts, and related products, and the suppliers of goods and services, in order to further the advancement of the industry. PTNPA members are manufacturers or companies engaged in providing goods and/or services to the manufacturer of one or more of the following products:

peanut butter, peanut butter sandwiches, packaged nuts, peanut and/or tree nut confections or bakery products, or other peanut and/or tree nut products.

SUMMARY

The Farm Security and Rural Investment Act of 2002 (the "Farm Bill"), P.L. 107-171, 7 U.S.C. §§ 1638-1638d, institutes, among other things, a program requiring retailers to include country of origin labeling for certain "covered commodities." The Bill excludes a covered commodity "if the item is an ingredient in a processed food item." The statute does not further define the phrase "processed food item" or establish parameters for the exclusion.

In its Guidelines for Interim Voluntary Country of Origin Labeling (the "Guidelines"), AMS—the entity vested with authority to implement the statute—contravenes the legislative intent behind the Farm Bill by proposing to regulate products already subject to the country of origin labeling requirements of the Tariff Act of 1930, as amended (19 U.S.C. § 1304; ("Section 304")). The Farm Bill was intended only to reach those products not already required to bear country of origin labeling. In addition to this burdensome overregulation, AMS proposes a narrow definition of "processed food item" that is flatly inconsistent with other federal statutory and regulatory definitions of the term "processed"—including even those definitions promulgated and used by AMS itself. The AMS departure from the established meaning of the term "processed" is not warranted by the statutory language of the Farm Bill, nor is it permitted by controlling administrative law precedent. Further, because products, such as shelled, roasted and salted or flavored peanuts, are clearly processed, the raw peanut ingredient is an "ingredient in a processed food item" and, thus, exempt from the Farm Bill's country of origin labeling requirement.

I. BACKGROUND

In the 2002 Farm Bill, Congress implemented a "Country of Origin Labeling" program for certain "covered commodities" specified in the statute, requiring retailers to "inform consumers * * * of the country of origin of the covered commodity." 7 U.S.C. § 1638a(a)(1). Retailers must notify consumers of a commodity's country of origin "by means of a label, stamp, mark, placard, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity" at the point of final retail sale. Id. § 1638a(c)(1). Retailers who violate the country of origin labeling requirements, and are found to have done so "willfully," may be fined up to $10,000 for each violation. Id. § 1638b.

The Bill supplies the following two-part definition of "covered commodity:"

(A) In general.—The term 'covered commodity' means –
  (i) muscle cuts of beef, lamb, and pork;
  (ii) ground beef, ground lamb, and ground pork;
  (iii) farm-raised fish;
  (iv) wild fish;
  (v) a perishable agricultural commodity; and
  (vi) peanuts.

(B) Exclusions.—The term "covered commodity" does not include an item described in subparagraph (A) if the item is an ingredient in a processed food item.

7 U.S.C. § 1638.

The Farm Bill authorizes AMS to issue guidelines and regulations implementing its country of origin requirements. Id. § 1638c(a), (b). Pursuant to that authority, AMS has issued what it calls interim "voluntary guidelines" implementing the country of origin labeling requirements of the Farm Bill, which will be replaced by regulations following notice-and-comment rulemaking. See id. § 1638c(a); Dep't of Agriculture, Agricultural Marketing Service, Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts Under the Authority of the Agricultural Marketing Act of 1946 (Docket No. LS-02-13). Presumably, these Guidelines are the basis upon which, after notice-and-comment rulemaking, mandatory country of origin labeling requirements will be developed. The Farm Bill requires that the regulations implementing a mandatory system take effect by September 30, 2004. 7 U.S.C. § 1638d.

In its Guidelines, AMS observes that the Farm Bill itself does not define the phrase "processed food item," and concludes that the agency "must define what constitutes a 'processed food item' for each covered commodity." Guidelines at 3. AMS concluded that it would define the phrase in two ways:

> First, a processed food item is defined as a combination of ingredients that result in a product with an identity that is different from that of the covered commodity. Such items include raw salmon when combined with other ingredients to produce sushi and peanuts when combined with other ingredients to produce a candy bar.
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> * * *
>
> Second, a commodity that is materially changed to the point that its character is substantially different from that of the covered commodity is also deemed to be a processed food item. This includes,

but is not limited to, changes that occur as a result of cooking, curing, or restructuring. However, covered commodities that retain their identity when combined with other ingredients, such as water enhanced case ready steaks, are not considered to be "processed food items" under these guidelines. [Id. at 4.]

As to peanuts, AMS states in its Guidelines that "[b]ecause the vast majority of peanuts sold at retail are shelled, roasted, and salted, the agency believes these products were intended to be covered by the law. Accordingly, shelling, roasting, salting, and flavoring of peanuts would not exclude these products from being subject to" the country of origin legislation. Guidelines at 5-6. AMS went on to note that "further processed peanut products, including such items as candy coated peanuts, peanut brittle, and peanut butter would not be covered by country of origin labeling guidelines. Similarly, where the peanuts are ingredients in other food products, such as peanuts in a candy bar, they would be excluded." Id. at 6.

II. AMS MANDATED COUNTRY OF ORIGIN LABELING FOR SHELLED, ROASTED, AND SALTED OR FLAVORED PEANUTS WOULD RESULT IN DUPLICATIVE REGULATION AND WOULD CONTRAVENE LEGISLATIVE INTENT

Section 304 requires country of origin labeling of "every article of foreign origin." 19 U.S.C. § 1304(a).1/ If "an article is incapable of being marked," however, it is exempt from such labeling requirements. Id. All named "covered commodities" in the Farm Bill, therefore, are exempted from country of origin labeling requirements. The statute also exempts from the marking requirement natural products, including produce, offered for sale to the ultimate purchaser in bulk and in their natural state. 19 U.S.C. § 1304(a)(3)(J); 19 C.F.R. § 134.33. Accordingly, under Section 304 and its implementing regulations, all peanuts sold in containers already are subject to country of origin labeling requirements. Only those products sold in bulk – such as in-shell peanuts – currently are not required to bear country of origin labeling.

The legislative history of the Farm Bill indicates that the country of origin labeling provisions were intended to extend to those commodities not currently required to bear such labeling in order to provide country of origin information to consumers. This limited intent is manifest by statements made during consideration of the Farm Bill. Senator Tim Johnson (D-SD), who sponsored the original legislation upon which the Farm Bill country of origin labeling provision

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1/ Section 304 is implemented by a comprehensive set of regulations administered by the Bureau of Customs and Border Protection, formerly the U.S. Customs Service ("Customs"). See 19 C.F.R. Part 134.

was based (S. 280), stated that "[u]nder present law, most products require labeling according to their country-of-origin if they are produced outside of the United States. However, some products, such as fruits, vegetables, and [unshelled] peanuts have been excluded from this requirement." Congressional Record at S4024 (May 8, 2002) (statement of Senator Johnson). Furthermore, Representative Mary Bono (R-CA), the sponsor of the House counterpart bill to S. 280, stated: "virtually everything bears its place of origin except for produce. I believe consumers want this to change." Congressional Record at H6353 (October 4, 2001) (statement of Representative Bono).

While Congress can, and often does, overregulate, it was not Congress' intent in this instance to create duplicative or overlapping requirements. AMS should avoid duplicative regulation and adhere to legislative intent by applying its country of origin labeling requirements only to those products not already required to bear such labeling. Accordingly, AMS regulations should extend only to those peanut products not already covered by Section 304 – namely bulk, in-shell peanuts. All other peanuts are fully and adequately regulated by Customs.

III. "PROCESSED FOOD" AS DEFINED IN RELATED FEDERAL LAWS AND REGULATIONS

AMS should also limit its regulation to in-shell peanuts because other peanuts, such as shelled, roasted, and salted or flavored peanuts, clearly fit within the exemption for "an ingredient in a processed food item." AMS' definition of "processed"—and specifically, its application to peanuts—as explained in the Guidelines contradicts established definitions of "processing" and "processed foods" historically used by the United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA).

A. The Organic Foods Production Act

In 1990, Congress passed the Organic Foods Production Act, 7 U.S.C. § 6501 et seq. To implement the National Organic Program as required by the Act, AMS drafted regulations requiring that agricultural products labeled as "organic" originate from certified farms or handling operations. As part of those regulations, AMS defined the term "processing" to mean: "cooking, baking, curing, heating, drying, mixing, grinding, churning, separating, extracting, slaughtering, cutting, fermenting, distilling, eviscerating, preserving, dehydrating, freezing, chilling, or otherwise manufacturing." 7 C.F.R. § 205.2.

B. The Agricultural Marketing Act

Pursuant to its authority under the Agricultural Marketing Act, 7 U.S.C. §§ 1621 et seq., AMS has promulgated numerous regulations defining and using the terms "processed" and "processing."

1. Meat

AMS regulations governing meat grading, certification, and standards define "processing" as "drying, curing, smoking, cooking, seasoning, or flavoring or any combination of such processes, with or without fabricating." 7 C.F.R. § 54.1. Further, the regulation governing the certification of equipment used to process meat defines "processing" as: "cooking, baking, curing, heating, drying, mixing, grinding, churning, separating, extracting, cutting, fermenting, eviscerating, preserving, dehydrating, freezing, or otherwise manufacturing." 7 C.F.R. § 54.1002. This definition is nearly identical to that provided in the National Organic Program regulations.

2. Egg Products

Egg products are regulated under the Egg Products Inspection Act, 21 U.S.C. §§ 1031-1056, and the Agricultural Marketing Act of 1946, as amended . The regulations governing the mandatory analyses of egg products define "processing" to mean "manufacturing of egg products, including breaking eggs or filtering, mixing, blending, pasteurizing, stabilizing, cooling, freezing, drying, or packaging egg products at official plants." 7 C.F.R. § 94.2.

3. Fruits and Vegetables

AMS regulations governing processed fruits and vegetables define "processed product" to mean "any fruit, vegetable, or other food product covered under the regulations in this part which has been preserved by any recognized commercial process, including, but not limited to canning, freezing, dehydrating, drying, the addition of chemical substances, or by fermentation." 7 C.F.R. § 52.2. This broad definition is echoed throughout individual fruit and vegetable commodity regulations. For example:

a. Avocados

"Processing" means "the manufacture of any avocado product which is preserved by any recognized commercial process, including canning, freezing, dehydrating, drying, the addition of chemical substances, or by fermentation." 7 C.F.R. § 915.140 (pertaining to avocados grown in South Florida).

b. Blueberries

"Processed blueberries means blueberries which have been frozen, dried, pureed, or made into juice." 7 C.F.R. § 1218.15.

c. Dried Prunes

"Processed prunes means prunes which have been cleaned, or treated with water or steam, by a handler." 7 C.F.R. § 993.9.

d. Limes

"Processing" means "the manufacture of any lime product which has been preserved by any recognized commercial process, including canning, freezing, dehydrating, drying, the addition of chemical substances, or by fermentation." 7 C.F.R. § 911.130 (pertaining to limes grown in Florida).

e. Papayas

The "commercial processing of papayas means to can, freeze, cook, slice, dice, or pickle or convert such fruit into a beverage base for resale." 7 C.F.R. § 928.151.

f. Popcorn

Popcorn is defined as unpopped corn having been "processed" by "shelling, cleaning, or drying." 7 C.F.R. § 1215.12.

C. AMS' Peanut Handling Regulations

On January 9, 2003, AMS published its Final Rule providing standards for the handling and marketing of peanuts. See Establishment of Minimum Quality and Handling Standards for Domestic and Imported Peanuts, 68 Fed. Reg. 1145, 1156 (Jan. 9, 2003) (codified at 7 C.F.R. §§ 996-999). Throughout the Federal Register notice, AMS refers to the various "processes" some peanuts undergo before sale, including the "blanching process" and the "shelling process;" and what is more, in the regulations themselves, AMS references the "roasting process." See 7 C.F.R. § 996.50. AMS thus has acknowledged throughout the peanut handling regulations that peanuts are in certain circumstances subjected to "processes" before being sold at retail—specifically including roasting. Yet AMS claims in its Guidelines that roasted peanuts are not "processed foods." See Guidelines at 5-6.

D. Other USDA Regulations

Other USDA regulations also define "processing" broadly. For example, in dairy import quota and fee regulations, "process" or "processing" means "any additional preparation of a dairy product, such as melting, grating, shredding, cutting and wrapping, or blending with an additional ingredient." 7 C.F.R. § 6.21. In regulations governing tobacco farm production, "processing" is defined as "a method of preparing green weight tobacco for storage in which the tobacco may be redried, stemmed, tipped, or threshed and the resulting product packed in a container." 7 C.F.R. § 723.104.

E. The Federal Food, Drug, and Cosmetic Act

The Federal Food, Drug, and Cosmetic Act (FDCA or the "Act"), 21 U.S.C. § 301 et seq., applies to most of the "covered commodities" listed in the Farm Bill. The Act itself defines "processed food" as: "any food other than a raw agricultural commodity and includes any raw agricultural commodity that has been subject to processing, such as canning, cooking, freezing, dehydration, and milling." 21 U.S.C. § 321(gg). In further guidance interpreting the term "processed food," FDA concluded that the "canning, freezing, cooking, pasteurization or homogenization, irradiation, milling, grinding, chopping, slicing, cutting, or peeling" of a food makes it a "processed food." Antimicrobial Food Additives Guidance, United States Department of Health and Human Services, Food and Drug Administration, 7-8 (July 1999).

F. Treatment of Peanuts Under The Established Regulatory Definitions

Under each of these established definitions described above, shelled, roasted, and salted or flavored peanuts would qualify as "processed" foods. Shelled peanuts are "separated" or "extracted," both "processes" identified by AMS itself in its National Organic Program regulations. Roasted peanuts are "cooked," a "process" under any other regulatory definition. Salted peanuts are "cured," "flavored," or "seasoned," all "processes" under the above regulatory definitions. AMS itself recognized in its peanut handling regulations that peanuts further treated from their original state—whether shelled, roasted, or salted—were subject to "processes" before being sold at retail.

Under AMS' far narrower definition for purposes of the country of origin legislation, however, shelled, roasted, and salted or flavored peanuts do not qualify as "processed" foods. Guidelines at 5-6. For AMS to justify its abrupt departure

from its established definition, the agency must demonstrate a reasoned basis for that departure. AMS cannot adequately make that showing.

IV. AMS' NARROW DEFINITION IS UNSUPPORTABLE

It is "axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent." ConAgra, Inc. v. NLRB, 117 F.3d 1435, 1443 (D.C.Cir.1997) (internal citation omitted). The same considerations apply outside the context of adjudications; an agency will be found by a reviewing court to have acted unreasonably if it departs from established policy without giving a reasoned explanation for the change. See id.; see also ANR Pipeline Co. v. FERC, 71 F.3d 897, 901 (D.C. Cir. 1995) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious."); Hatch v. FERC, 654 F.2d 825, 834 (D.C. Cir. 1981) ("[A]n agency must provide a reasoned explanation for any failure to adhere to its own precedents."). Consequently, for AMS' striking departure from its established definition of "processing" to pass muster, AMS must supply a "reasoned explanation" for its change of approach. The explanation it offers is not sufficient.

According to AMS, the agency's established definition of "processing"—i.e., "cooking, baking, curing, heating, drying, mixing, grinding, churning, separating, extracting, slaughtering, cutting, fermenting, distilling, eviscerating, preserving, dehydrating, freezing, chilling, or otherwise manufacturing," including "the packaging, canning, jarring, or otherwise enclosing food in a container"—was not appropriate for use with respect to the country of origin guidance. Guidance at 4. In the agency's view, employing that historical definition would exempt from the labeling requirements "many products that Congress intended to be covered;" for example, exempting muscle products of beef, lamb, and pork if they were "slaughtered" (and thus "processed" under AMS' established definition) would, in AMS' view, defeat Congress' intent to include such products as covered commodities. Id.

The definition AMS chose, however, went far beyond simply ensuring that each specified covered commodity would in fact be duly represented by country of origin labeling. The definition was not just a careful narrowing of its prior approach to conform to the needs of the statute, but a wholesale departure from the agency's consistent approach to the question of "processing" as addressed in prior regulatory contexts—including the context of peanut handling itself.

Nothing in the statute supports or justifies the conclusion that only foods that are inextricably combined with others, like peanuts in a candy bar, or foods that have completely changed their identity, like bacon, are "processed." To the contrary, by including the term "processed"—a term which had been given

consistent broad definition across agencies and across regulatory contexts—Congress presumptively intended that the term be applied as it traditionally has been applied, with only the narrowest changes necessary to preserve the meaning of the implementing statute.[2/] The agency thus should have striven both to give meaning to each "covered commodity" specified in the statute and to retain the broad core definition of "processed" historically incorporated into its regulations. This is possible, for example, by recognizing in-shell peanuts as covered commodities and processed products, such as shelled, roasted, and salted or flavored peanuts, as exempt. In other words, there was an interpretation that both would have satisfied Congress' intent to include specific commodities in its country of origin legislation and would have preserved the greater part of AMS' historical definition. Instead, the agency sped right by it in staking out its radical new interpretation of "processed" food. It should reconsider that definition as it undertakes review of its final regulations.

Further, there is no legislative history to support AMS' interpretation of the processed food exclusion as not including processed peanut products such as roasted peanuts. The agency simply posited that processed peanut products, such as shelled, roasted, flavored, and salted peanuts, "were intended to be covered by the law," without citing any legislative support for that supposition. It is well established, however, that "absent a clear indication of legislative intent to the contrary, the statutory language controls the construction." Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 (1981). The general rule of statutory construction "is that the intent of the lawmaker is to be found in the language that he has used." District of Columbia v. Gallagher, 734 A.2d 1087, 1090 (1999)(quoting U.S. v. Goldenberg, 168 U.S. 95, 102-103 (1897)). Where congressional intent "has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." Negonsott v. Samuels, 507 U.S. 99, 104 (1993)(quoting Griffin v. Oceanic Contractors, Inc., 458 US 564, 570 (1982)).

[2/] See United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) ("once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation * * *, then presumably the legislative intent has been correctly discerned"); Cannon v. University of Chicago, 441 U.S. 677, 696-698 (1979) (Court was "justified in presuming both that [Congressional] representatives were aware" of a prior statutory interpretation and "that that interpretation reflects [Congress'] intent" with respect to the legislation under challenge); Pfizer v. FDA, 753 F. Supp. 171, 178 (D. Md. 1990) (Congress "is assumed to know the judicial or administrative gloss given to particular statutory language, and therefore is assumed to have adopted the existing interpretation unless it affirmatively indicates otherwise").

Accordingly, AMS' narrow interpretation of the definition of "processed food" as applied to peanuts fails to honor administrative precedent and congressional intent.

Moreover, as we next explain, if AMS concludes that it will retain its current narrow definition, it should revise its interpretation of that definition as applied to peanuts to clarify that shelled, roasted and salted or flavored peanuts are "processed foods" even under its current approach.

V. IF AMS ADHERES TO ITS CURRENT DEFINITION, IT SHOULD CLARIFY THAT SHELLED, ROASTED AND SALTED OR FLAVORED PEANUTS ARE "PROCESSED FOODS" EVEN UNDER THAT DEFINITION

A. Roasting Materially Changes the Chemical and Physical Properties of a Raw Nut[3/]

When it is roasted, a raw peanut undergoes significant physical and chemical changes, "to the point that its character is substantially different from that of the covered commodity." Guidelines at 3. Raw peanuts and tree nuts are plant storage tissues; they contain large amounts of liquid oil, native protein, and soluble metabolites such as sucrose and free amino acids. These materials are prone to oxidation and hydrolysis by endogenous enzymes. The chemical reactions triggered by roasting change the raw nut irreversibly and generate the characteristic flavor not present in the raw kernel. Among other things, roasting denatures the nut's storage proteins to produce flavor compounds and aroma, as well as the brown pigments associated with the Maillard reaction (a complex interaction between sugars and amino groups). Proper roasting also produces the desired crisp texture of a roasted nut, while antioxidants generated by the application of high heat help preserve the freshness of the roasted product. With proper packaging, these desired roasted product attributes can be preserved for years.

Roasting, in sum, consumes amino acids, sugars, peptides, and other components to produce the characteristic flavor, color, and physical structure of a roasted nut. None of these features exists in the raw nut, and a roasted nut therefore is "substantially different" from its raw counterpart, just as the current Guidelines require.

3/ In the following section, we do not include a discussion of mixed nut products as "materially changed," and thus processed foods excluded from country of origin labeling requirements, because the agency has already indicated in informal discussions that it agrees with this proposition.

B. As Reflected in FDA Statements of Identity, Roasting Confers an Identity that is Different from the Covered Commodity

FDA regulations require that all food in packaged form bear a "statement of identity," stated in terms of the "standard of identity" prescribed by regulation. In the absence of a statement of identity, FDA regulations require that packaged food display the common or usual name of the food—or, in the absence of that, an appropriately descriptive term. See 21 C.F.R. § 101.3. If packaged food does not bear an appropriate statement of identity, it is considered "misbranded." See 21 U.S.C. § 343(g)(i). 4/

A "standard of identity" exists for mixed nuts and peanut butter, and a common or usual name has been established by regulation for peanut spread. All other peanut products, therefore, must bear the common or usual name established by industry practice or an "appropriately descriptive name." A common or usual name must:

> accurately identify or describe, in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients. The name shall be uniform among all identical or similar products and may not be confusingly similar to the name of any other food that is not reasonably encompassed within the same name. 21 C.F.R. § 102.5(a).

There are numerous common and usual names for peanut products in the marketplace. These names uniformly reflect the addition of ingredients (for example, salt or other flavoring) as well as the application of specific processes (for example, shelling and roasting). Including such terms in the products' common and usual names reflects a longstanding judgment that the addition of ingredients, such as salt and flavoring, and processing steps, such as shelling and roasting, materially alter the basic nature of the raw commodity. If shelling, roasting, salting, and flavoring did not change the basic nature of the commodity, we would expect, in keeping with FDA's regulation, that all peanut products in the marketplace simply would be called "peanuts." But that is not the case.

It necessarily follows that, even under AMS' current definition (which, for the reasons set forth above, is unduly restrictive), shelled, roasted, and salted or flavored peanuts are "processed foods." As AMS explains in its Guidelines, "a

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4/ A food is deemed misbranded if "it purports to be or is represented as a food for which a definition and standard of identity has been prescribed" and does not comply with the standard, or if it fails to bear "the common or usual name of the food, if any there be." Id.

commodity that is materially changed to the point that its character is substantially different from that of the covered commodity is also deemed to be a processed food item. This includes, but is not limited to, changes that occur as a result of cooking, curing, or restructuring." Guidelines at 4. Under this definition, a peanut product required by law to be sold under a different statement of identity or a different common or usual name—like a salted or roasted peanut—has been "materially changed."

The fact that, as AMS points out in the Guidelines, a substantial portion of peanuts are roasted or salted (see Guidelines at 5-6) is not controlling. If Congress intended for "roasted peanuts" or "salted peanuts" to carry a statement of origin pursuant to the Farm Bill, it could have said so; but it did not. If anything, the sparse legislative history of this late addition to the Farm Bill suggests the opposite.[5/] Applying the definition of "processed foods" in keeping with FDA's statement of identity and misbranding regulations, and thus defining shelled, roasted, and salted or flavored peanuts as processed foods, still gives meaning to the country of origin legislation; in-shell peanuts are still subject to the law's requirements. AMS should not employ a purely speculative assessment of Congressional intent (particularly when the existing legislative history suggests a contrary interpretation), and it should not apply its definition of "processed food" to peanuts in a manner creating great tension with FDA's statement of identity language.

In its Guidelines, AMS recognizes that material changes, such as those experienced by raw peanuts in the roasting process, alter the identity of all of the other covered commodities and, thus, exempt those commodities from country of origin labeling requirements. For example, "cooked and canned fish products" are excluded, and products such as Beef Wellington are excluded "because the combination of ingredients with the covered commodity (muscle cut of beef) creates a product with an identity different from the covered commodity." According to the Guidelines, "cooking, curing, or restructuring" exempts the covered commodities from country of origin labeling requirements. Without justification, however, the Guidelines treat peanuts differently. Absent specific legislative guidance to the contrary, the processed food exemption should be applied to all covered commodities—without an unexplained deviation with regard to peanuts.

5/ Prior to the passage of the Farm Bill, Georgia Senator Cleland had introduced a bill requiring the country of origin labeling of "peanuts" and "peanut products." When the Farm Bill was in its final day of mark-up, Senator Wellstone introduced an amendment adding "peanuts"—and only "peanuts"—to the country of origin labeling provision. The amendment was accepted without discussion; Cleland's original bill went no further; and, the Farm Bill was passed.

VI. IN ANY EVENT, RAW PEANUTS THAT ARE ROASTED, SALTED, OR SIMILARLY PROCESSED ARE "INGREDIENTS IN PROCESSED FOOD ITEMS," AND THEREFORE EXCLUDED FROM COVERAGE

The Farm Bill excludes from country of origin labeling requirements any "ingredient in a processed food item." See 7 U.S.C. § 1638. AMS in its Guidelines has focused on the definition of "processed food item," and on whether peanuts subjected to roasting, salting, or other processes are "processed food items." But even more fundamentally, a glance at the so-called information panel of a label on a jar of roasted peanuts demonstrates that peanuts are "ingredient[s] in a processed food item," and, therefore, are excluded from the coverage of the statute. A jar of roasted peanuts typically contains several ingredients; peanuts, of course, are the predominant ingredient by weight, but (in keeping with the necessary changes and additions to the product that roasting requires), ingredients in a jar of roasted peanuts also include salt, oils, and various other ingredients. (See the Appendix for a list of several peanut product statements of identity and their corresponding typical ingredient statements.) Thus under the plain terms of the statute, shelled, roasted, and salted or flavored peanuts sold in containers are "ingredient[s] in a processed food item." Any consumer at a local grocery store would understand them to be as much.

In its Guidelines, AMS declined to adopt a definition that would "exclude any 'ingredient' listed on an ingredient label." Guidelines at 4. The reason AMS offered was that, were it merely to exclude an item based on whether it was listed as an "ingredient," bagged lettuce—which lists only lettuce as an "ingredient" on its packaging—would be excluded from coverage. Id. But the agency's treatment neglected to take into account the rest of the statute; the statute requires that a commodity be "an ingredient in a processed food item." Bagged lettuce may be an "ingredient," but it is hard to discern how a bag of lettuce is an "ingredient in a processed food item." In contrast, the ingredient of "peanuts" in a jar of roasted peanuts is, while predominant by weight, one of many listed items, which supports both the conclusion that it is a bona fide "ingredient" and the conclusion that the jarred product of roasted peanuts as a whole is a "processed food item."

CONCLUSION

The agency's application of its country of origin labeling requirements to commodities, like roasted and salted peanuts, that are already covered by Customs country of origin labeling requirements is unnecessarily duplicative and burdensome and cannot be reconciled with legislative intent. Further, because the agency's drastic narrowing of its historical definition cannot be reconciled with its past practice or the statute, the agency should modify its Guidelines interpretation to honor legislative intent and to reincorporate much of its historic definition of "processed foods" into its country of origin labeling. In particular, with respect to

peanuts, the agency should consider reinstating its consistent position—confirmed again only recently in its Final Rule on peanut handling regulations—that shelled, roasted, and salted or flavored peanuts are "processed foods."

In the alternative, if AMS retains its current definition, the agency should clarify that shelled, roasted, and salted or flavored peanuts satisfy the definition of "processed foods" because—as shown by applicable FDA regulations governing statements of identity—such commodities have been materially changed from their original state. And in addition, under the plain text of the Farm Bill, a raw peanut included as one of many ingredients in a package of shelled, roasted, salted, or similarly processed peanuts is "an ingredient in a processed food item."

Again, we appreciate the opportunity to provide these comments relative to this important issue. Thank you for your consideration.

Sincerely,

James A. McCarthy
President & CEO
Snack Food Association

Russell E. Barker
Executive Vice President
Peanut & Tree Nut Processors Association

APPENDIX

Statement of Identity	**Ingredient Statement**
Salted Peanuts	peanuts, peanut oil, salt
Honey Roasted Peanuts	peanuts, sugar, honey, corn syrup, salt, peanut oil, xanthan gum
Cocktail Peanuts	peanuts, peanut oil, salt
Dry Roasted Peanuts Lightly Salted	peanuts, salt, maltodextrin, cornstarch, corn syrup solids
Dry Roasted Peanuts	peanuts, salt, sugar, cornstarch, monosodium glutamate (flavor enhancer), dried yeast, gelatin, hydrolyzed soy protein, paprika, onion and garlic powders, spices, natural flavor